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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MANUEL MARTIN GUZMAN, Defendant and Appellant.	C072650 (Super. Ct. No. 11F05045)

Seeking to recover his personal property and to talk to his ex-girlfriend Yvette Ferrari, Mario Rodriguez went to the apartment where Ferrari and her new boyfriend, defendant Manuel Guzman, were staying. During the resulting confrontation, defendant shot and killed Rodriguez. A jury found defendant guilty of second degree murder (Pen.

Code, § 187, subd. (a))[1] and found true the allegation that he personally discharged a firearm causing death (§ 12022.53, subds. (b)-(d)). The trial court found true that defendant had a strike prior (§§ 667, subds. (b)-(i); 1170.12) and sentenced him to 55 years to life in prison.

On appeal, defendant contends: (1) CALCRIM No. 362 is constitutionally infirm; (2) trial counsel was ineffective in failing to redact references to defendant's criminal record in his statement to the police before it was played to the jury; (3) it was an abuse of discretion not to strike his strike prior, which he committed 21 years earlier when he was 17; and (4) his sentence is cruel and unusual. Disagreeing, we shall affirm.

FACTS

Joey Chinn was a close friend of Rodriguez. They had recently spent 60 days together in custody on drug-related matters. After each completed an inpatient drug treatment program, Rodriguez called Chinn, needing a place to stay. Chinn told Rodriguez he could stay in his garage. Rodriguez came over on July 17, 2011, and they spent the day drinking and smoking methamphetamine.

That night Rodriguez wanted to get his clothes and other property from his ex-girlfriend Ferrari. Chinn knew, from his time in custody with Rodriguez, that Rodriguez had an ex-girlfriend who was now with another man. Ferrari had been Rodriguez's girlfriend, but was now defendant's. Chinn called his brother-in-law Elias Hinojos, for a ride. The three men drove to the Madison Avenue apartment of Alexander Garcia, defendant's friend, where defendant and Ferrari were staying with Garcia and Aurora Tobar. Garcia had known defendant for 10 years and loved him like a brother.

Garcia answered the door that night and Rodriguez asked for Ferrari. Garcia told him that Ferrari and defendant were not there. He let Rodriguez in to collect his things, but had his friends wait outside. Shortly after Rodriguez entered the apartment, defendant and Ferrari returned.

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[1] Further undesignated statutory references are to the Penal Code.

Rodriguez was emotional talking to Ferrari. He told her "that he loved her and his heart was broken." Defendant had a gun and exchanged words with Rodriguez, who suggested they take the dispute outside. There was a brief struggle and defendant shot Rodriguez.

Chinn and Hinojos left after the shot was fired. Defendant also left with Ferrari, although Garcia asked him to stay. Garcia called 911. When questioned by the police, Garcia told "some enormous lies," implicating two innocent men as the killers. At trial, Garcia's testimony favored defendant and he told a version of events he had never told before. Both Garcia and Tobar testified Rodriguez lunged at defendant just before the shot was fired. Chinn, Hinojos, Garcia, and Tobar all testified under a grant of use immunity.

Defendant testified in his defense and claimed Rodriguez had the gun. He tried to grab the gun and in his struggle with Rodriguez the gun went off. In an earlier statement to the police, played at trial, defendant had denied that he and Ferrari were even at the apartment that night.

The murder weapon was a .357 Magnum. The bullet entered Rodriguez's upper chest, went through his left lung and aorta, into his right lung, and exited his back through the seventh rib. A major disputed issue at trial was the amount of distance between defendant and Rodriguez when the shot was fired. Experts gave differing opinions based on their review of the condition of the wound, the presence or absence of soot and gunshot residue, and the hole in Rodriguez's T-shirt. The forensic pathologist from the Sacramento County Coroner's Office testified the shot was from about four feet away. The defense called an expert pathologist who opined the shot was fired at close range, less than a foot away. A criminalist testifying for the defense estimated the distance at six inches or fewer, based on the size of the hole in Rodriguez's T-shirt. The People's criminalist disputed that estimate, testifying in summary that under conditions more accurately simulating a human target, the outcome of the same test regarding distance indicated a longer range.

DISCUSSION

I

CALCRIM No. 362

The trial court instructed the jury with CALCRIM No. 362 as follows: "If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing that the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime, and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

Defendant contends this instruction creates an unlawful presumption that lightens the prosecution's burden of proof. He argues the instruction impermissibly suggests that if defendant lied about the charged crime before trial, the jury may infer he was aware of his guilt of the *charged crime*, even though defendant may be aware only of his guilt of a *lesser crime*. Thus, defendant concludes, the instruction "erects an impermissible presumption, allowing the jury to infer defendant's guilt of the charged crime rather than a lesser crime."

Defendant acknowledges that our Supreme Court has rejected a similar challenge to the constitutionality of CALCRIM No. 362's predecessor, CALJIC No. 2.03. (*People v. Crandell* (1988) 46 Cal.3d 833, 871 (*Crandell*), disapproved on another point in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) Defendant contends, however, that the slight difference in the wording between CALCRIM No. 362 and CALJIC No. 2.03 renders the former constitutionally deficient. We disagree.

CALJIC No. 2.03 allows a jury to consider a defendant's false statement "as a circumstance tending to prove a consciousness of guilt." In *Crandell*, the defendant argued a jury might view "consciousness of guilt" as equivalent to a confession, establishing all the elements of the charged murder offenses, and thus draw an impermissible inference. Our Supreme Court disagreed: "A reasonable juror would understand 'consciousness of guilt' to mean 'consciousness of some wrongdoing' rather

than 'consciousness of having committed the specific offense charged.' " (*Crandell, supra,* 46 Cal.3d at p. 871.)

Defendant contends CALCRIM No. 362 contains the very infirmity that CALJIC No. 2.03 avoided. Because the instruction begins by referring to the "charged crime," and allows the jury to use a false or misleading statement to show defendant's awareness of "his guilt of *the* crime," he argues the instruction permits the jury to infer consciousness of guilt of the specific crime charged, here murder, including defendant's mental state at the time of the offense.

In *People v. McGowan* (2008) 160 Cal.App.4th 1099, we rejected a challenge to CALCRIM No. 362 as an improper pinpoint instruction. We held: "Although there are minor differences between CALJIC No. 2.03 and CALCRIM No. 362 . . . , none is sufficient to undermine our Supreme Court's approval of the language of these instructions." (*Id.* at p. 1104.) Defendant gives us no reason to reevaluate our conclusion in *McGowan*; indeed, he does not even discuss *McGowan*. Both instructions refer to a defendant's psychological, not legal, guilt, something a reasonable jury would have understood. "The inference of consciousness of guilt from willful falsehood or fabrication or suppression of evidence is one supported by common sense, which many jurors are likely to indulge even without an instruction." (*People v. Holloway* (2004) 33 Cal.4th 96, 142.) We find defendant's interpretation of CALCRIM No. 362 flawed because he reads too much into one phrase, ignores the rest of the instruction, and reads into the instruction an inference about his mental state that is not there.

In addressing a challenge to a jury instruction, we consider the instructions as a whole. (*People v. Cain* (1995) 10 Cal.4th 1, 36.) Here, the trial court also included CALCRIM No. 359, which made clear that the jury was to consider lesser-included offenses. The court instructed the jury immediately before reading CALCRIM No. 362 that: "You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime *or a lesser-included offense* was committed." Finally, the People argued to the jury that defendant kept lying

"to get away with murder and any lesser offense," a characterization which supports our conclusion. We reject defendant's challenge to CALCRIM No. 362.

II

Ineffective Assistance of Counsel

Defendant's statement to the police, in which he denied being present when Rodriguez was shot, was played to the jury. Defendant contends he received ineffective assistance of counsel because his trial counsel failed to redact a portion of that statement regarding his prior criminal record. Defendant contends there could be no tactical purpose for the failure to redact that portion of the statement, noting that a second reference to defendant's serving time in jail was redacted and that the trial court granted the defense motion to preclude use of defendant's prior for impeachment because it was so old.

Defense counsel apparently *wanted* to move to suppress defendant's entire statement to the police, but he concluded that "unfortunately" he had no legal basis for doing so. The prosecutor wanted to redact certain portions of the statement, while the defense wanted it played in its entirety. In the interview, the police questioned defendant about how he met Rodriguez. The detective clarified that both were out of custody and they had not served time together. Defendant said no. "I ain't been in jail -- I did my time when I was a teenager, and I haven't been back to jail since. I haven't gone in like 18 years, I -- I've been good." The prosecutor wanted to redact this portion, claiming it was self-serving and not accurate. The defense disagreed. The trial court suggested it might be better to deal with the impeachment issue first.

The prosecutor was concerned about some of defendant's statements that "dirtie[d] up" the victim. The defense wanted completeness to show the nature of the relationship between defendant and Rodriguez. The parties agreed to redact a statement where defendant said, "I've been in jail," but the defense continued to want to retain the earlier statement about not being in jail for 18 years. The trial court agreed that statement was

relevant; it painted a picture that defendant knew Rodriguez, but "not in the same manner" as Chinn, who had been in jail on drug charges with Rodriguez. The court concluded, "otherwise [the jury] could be left with an inference that [defendant] has done significant amounts of time in jail."

"A criminal defendant's federal and state constitutional rights to counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) include[] the right to *effective* legal assistance. When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding. [Citations.]" (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

In reviewing a claim of ineffective assistance of counsel, we defer to counsel's tactical decisions and there is a strong presumption that counsel's conduct falls within the broad range of reasonable performance. (*People v. Stanley* (2006) 39 Cal.4th 913, 954.) Defendant fails to overcome that strong presumption and cannot establish on direct appeal that his trial counsel's performance was deficient. Contrary to defendant's assertion, this is not a case where there could be no rational tactical purpose for the

challenged omission. Trial counsel indicated he wanted the statement in for completeness and because it accurately showed that defendant had not been in jail since he was a teenager. The trial court expanded upon this rationale, indicating the statement clarified that defendant, unlike Rodriguez and Chinn, had not been in jail either recently or for a significant amount of time. Defendant claimed Rodriguez had been in jail three or four times and "had problems with every which fuckin[g] angle there was." He suggested Rodriguez was a bad influence and told the police that he and Ferrari were trying to stay away from him and his "crowd." Defendant's statement about not having been in jail since he was a teenager bolstered defendant's attempt to distinguish himself from Rodriguez.

The claim of ineffective assistance of counsel fails.

III

Romero Motion

Defendant contends the trial court abused its discretion in failing to strike his strike. He contends the trial court ignored four facts relevant to its decision: (1) defendant was a juvenile when he committed the felony; (2) he has led a "virtually" blameless life for 21 years (except for two misdemeanor convictions); (3) the court had ruled the prior too old to be used for impeachment; and (4) the current murder was less serious than some and "would not have occurred had Rodriguez not illegally forced his way into Garcia's apartment."

When a prior felony conviction is alleged under the three strikes law, a trial court has discretion to dismiss it under section 1385. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.) The court's discretion, however, is limited. (*Id*. at p. 530.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and

circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

In reviewing the denial of a *Romero* motion, the trial court's decision to strike or not strike a previous serious or violent felony is reviewed under a deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) "[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]." (*Id*. at p. 378.)

Trial counsel urged the court to strike the strike for the same reason the court ruled it could not be used for impeachment--because it was old. The People argued that defendant's prior should have prohibited him from having guns, but he used one in this case and there was evidence he possessed firearms on other occasions. The trial court found whether a prior conviction could be used for impeachment was a different issue than whether it could be used for sentencing and declined to exercise its discretion to strike the prior. The trial court, having reviewed the documents proving the strike, was well aware that defendant's strike was old and committed when he was a juvenile, but found that was not reason to strike it. This finding was well within the court's discretion.

Age alone does not determine whether a strike should be dismissed; "the trial court should not simply consult the Gregorian calendar with blinders on." (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.) Defendant had not led a crime-free life since his juvenile conviction. Significantly, his other criminal behavior was much more recent. He had a misdemeanor conviction for driving under the influence (Veh. Code, § 23152, subd. (b)) in 2008, and a 2010 misdemeanor conviction under former section

653k (possession or sale of a switchblade knife). He was on probation for these convictions in two different counties when he committed the current offense. His unlawful behavior continued while in jail; he received 13 days of full restriction for failing to comply with directives and 15 days full restriction for participating in a multiple inmate fight. Defendant offered nothing as to his background, character, and prospects to show he was outside the spirit of the three strikes law. Although defendant attempts to reduce his culpability by blaming the murder on Rodriguez's actions, the jury found defendant guilty of second degree murder, and the trial court appropriately considered relevant factors in its analysis.

IV

Cruel and Unusual Sentence

In a supplemental brief, defendant contends his sentence of 55 years to life is cruel and unusual under both the United States and California Constitutions.[2] His argument is premised on the fact that he committed his prior felony conviction, the strike that caused him to be sentenced under the three strikes law, in 1990 when he was 17 years old. He relies on a series of United States Supreme Court cases that have recognized the lesser culpability of children in the context of the death penalty or life imprisonment without parole: *Roper v. Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1] [8th Amendment prohibits death penalty for minors]; *Graham v. Florida* (2010) 560 U.S. 48 [176 L.Ed.2d 825] [8th Amendment prohibits sentence of life without parole for minors who do not commit homicide]; *Miller v. Alabama* (2012) 567 U.S. ___ [183 L.Ed.2d 407] [8th Amendment prohibits mandatory life in prison without the possibility of parole for

[2] We note the abstract of judgment incorrectly reflects a sentence of 15 years to life on count 1, rather than the 30 years to life sentence actually imposed on that count due to defendant's strike. We shall direct the trial court to correct the abstract by recording the 30 years to life sentence in box 6.c.

minors]; as well as *People v. Caballero* (2012) 55 Cal.4th 262 [sentence that exceeds juvenile's natural life expectancy is the equivalent of life without parole].

Defendant, who was born in 1973, asserts that he will not be eligible for parole within his life expectancy due to the doubling of his sentence under the three strikes law. He argues that he has no chance for parole "because of" his juvenile offense and therefore his sentence is cruel and unusual. We reject defendant's contention.

First, defendant did not raise the claim of cruel and unusual punishment in the trial court and therefore is precluded from raising it on appeal. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

Second, the premise of defendant's argument is incorrect. He is not being punished more severely due to his actions as a minor. Rather, his increased punishment is due entirely to his actions as a 38-year-old adult. "Under the three strikes law, defendants are punished not just for their current offense but for their recidivism. Recidivism in the commission of multiple felonies poses a danger to society justifying the imposition of longer sentences for subsequent offenses. [Citation.]" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823-824.) It has long been recognized that recidivist statutes do not punish the prior offense a second time, but impose more severe punishment for the subsequent offense. (*Moore v. Missouri* (1895) 159 U.S. 673, 676 [40 L.Ed.2d 301].) Defendant's decision to reoffend occurred when he was an adult. Because defendant's sentence is based on his actions *as an adult*, the case law he cites about the lesser culpability of minors is inapposite.

DISPOSITION

The judgment is affirmed. We direct the trial court to correct the abstract of judgment as described *ante* and provide a certified copy of the corrected abstract to the Department of Corrections and Rehabilitation.

DUARTE, J.

We concur:

HULL, Acting P. J.

HOCH, J.